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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No. [redacted] 135

LEROY SILVERSTEIN and GEORGE HARRIS,

Petitioners,

vs.

CRAIG PHELPS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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To: *The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:*

RESPONDENT'S STATEMENT OF THE CASE.

The respondent has found it necessary to restate the facts of the case, since the petitioners' statement is both inaccurate and incomplete.

The respondent, trustee of Sterling-Harris Ford, Inc., bankrupt, filed petitions for turnover orders (App. 1-2) against

each of the petitioners herein, Leroy Silverstein and George Harris. These petitions alleged that Silverstein and Harris had each received the sum of $7,500.00 which was the property of the bankrupt estate, and prayed that they be directed to deliver said sums to the trustee.

The only response made by Silverstein to the allegations of the trustee's petition was in the form of an "Answer" (App. 2), sworn to by the attorney for Silverstein, which admitted that he had received the $7,500.00 check and that a portion of the proceeds was used to redeem payroll checks previously issued to the bankrupt's employees. However, Silverstein refused to testify or introduce any evidence in response to the petition.

Harris likewise refused to testify or introduce any evidence. His only response to the allegations of the trustee's petition was in the form of a "Response" (App. 7-9), which stated that "if respondent could testify without waiving his right to invoke the protection of the Fifth Amendment of the Constitution", he would deny that he possessed funds of the bankrupt estate.

Based upon the pleadings, evidence introduced by the trustee and stipulated facts, the referee entered findings of fact, and issued turnover orders directing each of the petitioners to turn over the sum of $7,500.00 to the trustee. These orders were affirmed by the District Court.

The trustee then filed his petitions praying that the referee certify to the District Judge the fact that Silverstein and Harris had disobeyed the turnover orders. The referee issued his certificates. The District Judge then, after each petitioner had declined to offer any testimony on his behalf, adjudged both Silverstein and Harris in contempt for disobeyance of the turnover orders, and ordered that they be committed to the United States Marshal.

QUESTION FOR REVIEW.

The question here presented for review is whether, based upon the pleadings, evidence, exhibits and findings of the Referee, it was clearly erroneous for the District Court to have applied the rebuttable presumption of continued possession, in order to reach the conclusion of present control from proof of previous possession.

ARGUMENT.

The principles applicable to this cause were clearly stated by this Court in *Maggio* v. *Zeitz*, 333 U.S. 56 (1948). The Court below applied those principles in reaching its decision. The identical question was raised in the recent case of *Sahn* v. *Pagano*, 302 F. 2d 629 (2nd Cir. 1962), certiorari denied 371 U.S. 819 (1962).

No constitutional questions are involved. The petition does not suggest that any of the grounds for certiorari set forth in Supreme Court Rule 19 are present here. It is therefore essential that some "special or important reason" must exist to call for the exercise of the Court's discretion in granting the writ. It is submitted that no such reason exists.

The referee found that on March 15, 1961, Silverstein and Harris each received the sum of $7,500.00, property of the bankrupt estate. Under General Order in Bankruptcy No. 47, the findings of fact of a referee must be accepted, unless clearly erroneous. Neither the District Court nor the Court of Appeals found any error in these findings.

For the referee to have concluded that these funds remained in the hands of Silverstein and Harris at the time of the subsequent turnover proceedings, it was necessary for the referee to follow that chain of reasoning referred to by the Courts as the presumption of continued possession. The question is whether the referee's application of that chain of reasoning under the facts disclosed in this record is clearly erroneous.

The means for precluding the application of that chain of reasoning were available to both Silverstein and Harris, but they refused to make use of it. Their refusal to testify

as to the present possession of the funds, their silence, is clearly a circumstance which the trier of fact was entitled to consider in deciding whether they were, in fact, in possession of the property sought to be reached.

Petitioners take the position that the case of *Maggio* v. *Zeitz*, discarded and laid to rest the presumption of continued possession. The *Maggio* case involved contempt proceedings against one Joseph Maggio, president and manager of the bankrupt therein for failure to turn over certain assets which the Referee in Bankruptcy found to have been in his hands at the time of the entry of a turnover order upon him.

In that case it was proven that a shortage occurred in the bankrupt's stock of merchandise over a year before the turnover order was entered and that, at the time of the shortage, Maggio personally took possession of those assets. There was no evidence whatsoever that Maggio had present possession of the bankrupt's property. The lower courts felt bound to apply a rigid presumption of continuing possession and therefore found that Maggio had present possession of the bankrupt's property.

In vacating the judgments below and remanding the cause for further proceedings consistent with the opinion, this Court cleared the smoke which had surrounded the presumption of continuing possession. Your Honors pointed out that "* * * a process of reasoning from one fact to another, an argument which infers a fact otherwise doubtful from a fact which is proved" (p. 66), seemed to have developed into a "rigid presumption which it is said the lower courts apply without regard to its reasonableness in the particular case." (p. 65) The court made it clear that the presumption is not a rule of law, irrebuttable.

The Court did not preclude the application of the presumption of continuing possession in cases where its application is reasonable. The Court said:

> "• • • turnover orders should not be issued, or approved on appeal, merely on proof that at some past time property was in the possession or control of the accused party, *unless the time element and other factors make that a fair and reasonable inference.*"
>
> "Under some circumstances it may be permissible, in resolving the unknown from the known, to reach the conclusion of present control from proof of previous possession." (p. 65) (Emphasis ours)

Thus, the application by the lower courts of the presumption in *Maggio*, was on the basis of the facts presented by the record in that case unreasonable, and the Supreme Court so held.

In the instant case, the application of presumption is reasonable.

The petitioners urge that the trustee has not met his burden of proof. That the trustee has the burden of proof as to present possession is clear. However, the trustee need only establish a *prima facie* case; and at that point, the burden of going forward shifts to the respondent. *Sheinman v. Chalmers*, 33 F. 2d 902 (3rd Cir. 1929); *Rossi v. United States*, 289 U.S. 89 (1933); *In re Fisher*, 32 F. Supp. 69 (D. Md. 1940); *In re Victor's Ladies Shop*, 45 F. Supp. 417 (E.D. Pa. 1940).

From the fact that the funds were received by Silverstein and Harris on March 15, 1961, coupled with the fact that the petitioners stood mute and failed to introduce any evidence as to whether these funds were in their possession, it is reasonable to find as the referee did that the trustee has established *prima facie* that the petitioners had possession of the funds at the time of the turnover pro-

ceedings. At that point, the burden of going forward—of offering some evidence to explain—shifted to the petitioners. Petitioners failed to carry this burden.

The Harris proceeding is before the Court on the pleadings of the parties, consisting of the trustee's turnover petition and the response of George Harris. The only portion of that response which in any way refers to the trustee's petition states that "if respondent could testify without waiving his right to invoke the protection of the Fifth Amendment to the Constitution, he would state * * *" that he did not possess funds belonging to the bankrupt.

This statement certainly does not constitute a denial of any of the allegations of the trustee's petition. It was nothing more than a statement of what Harris would testify to upon the condition that by testifying he would not waive his privilege under the Fifth Amendment to the Constitution of the United States. Under Rule 8(d) of the Federal Rules of Civil Procedure, upon Harris' failure to deny, all of the allegations of the trustee's petition must be taken as admitted. The facts set forth in the trustee's petition clearly justify and support the referee's findings and order upon Harris to turn over the sum of $7,500.00 to the trustee.

This Court has denied certiorari in the recent case of *Sahn* v. *Pagano*, which is a case directly in point. Joseph Pagano, president of the bankrupt company, had received funds of the bankrupt totaling $745,000. He was asked what he had done with these funds, and he refused to answer on the ground that an answer might tend to incriminate him.

The Court of Appeals said:

> "Pagano was free to avail himself of the privilege against self-incrimination but—whether or not an inference could be drawn from his doing so in a pro-

ceeding of this sort, see 8 Wigmore, Evidence (McNaughton rev. 1961), §2227, at p. 439 & fn 14—his claim that testimony would incriminate him cannot be transformed into a plausible assertion of innocence in the acquisition of the monies or an adequate denial of continued possession of them, *Dittmar* v. *Michelson*, 281 F. 116, 117 (3 Cir.), cert. denied, 260 U.S. 738, 43 S. Ct. 95, 67 L. Ed. 489 (1922) * * * Accepting that the Referee and the Court in passing on the issue under * * * a turnover motion should * * * require clear evidence of the justice of such an order before it is made, *Oriel* v. *Russell*, 278 U.S. 358, 363, 49 S. Ct. 173, 73 L. Ed. 419 (1929), we think this test was met." (p. 632)

CONCLUSION.

The respondent respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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